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No. 1089

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

RALSTON STEEL CORPORATION, ASSIGNEE OF MORGAN MANUFACTURING CORPORATION,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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To The Honorable, Chief Justice and Associate Justices Of The Supreme Court of The United States:

Your petitioner, Ralston Steel Corporation, Assignee of Morgan Manufacturing Corporation, an Illinois corporation, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Claims.

JUDGMENT AND OPINION OF THE COURT BELOW

On January 22, 1965, the United States Court of Claims rendered a judgment against petitioner denying it the right to recover from the United States Treasury Department moneys which it had posted for and on behalf of certain taxpayers under an Offer in Compromise. The case is recorded as No. 155-59; 346 F. 2d, 63, and is hereto appended as Appendix "A".

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1255(1).

The judgment of the United States Court of Claims was entered on January 22, 1965.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Treasury Department unduly proscrastinates in its consideration of Offers in Compromise.

2. Whether the lower Court properly interpreted the meaning of the terms, "Maker of such offer", as contained in Section 7809 of the 1954 Internal Revenue Code, and "proponent", as set forth in Treasury Regulation 301.7122-1.

3. Whether the lower Court properly interpreted the word "rejection", as contained in Section 7809 of the Internal Revenue Code and Treasury Regulation 301.7122-1.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

Sec. 7122. COMPROMISES.

(a) Authorization.—The Secretary or his delegate may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense. (26 U.S.C. 1958 ed., Sec. 7122).

Sec. 7809. DEPOSIT OF COLLECTIONS.

(a) General Rule.—Except as provided in subsection (b), sections 4735, 4762, 7651, 7652 and 7654, the gross amount of all taxes and revenues received under the provisions of this title, and collections of whatever nature received or collected by authority of any internal revenue law, shall be paid daily into the Treasury of the United States under instructions of the Secretary or his delegate as internal revenue collections, by the officer or employee receiving or collecting the same, without any abatement or deduction on account of salary, compensation, fees, costs, charges, expenses, or claims of any description. A certificate of such payment, stating the name of the depositor and the specific account on which the deposit was made, signed by the Treasurer of the United States, designated depositary, or proper officer of a deposit bank, shall be transmitted to the Secretary or his delegate.

(b) Deposit funds.—In accordance with instructions of the Secretary or his delegate, there shall be deposited with the Treasurer of the United States in a deposit fund account —

(1) Sums offered in Compromise.—Sums offered in compromise under the provisions of Section 7122;

(2) Sums offered for purchase of real estate.—Sums offered for the purchase of real estate under the provisions of section 7506; and

(3) Surplus proceeds in sales under levy.—Surplus proceeds in any sale under levy, after making allowance for the amount of the tax, interest, penalties, and additions thereto, for costs and charges of the levy and sale. Upon the acceptance of such offer in compromise or offer for the purchase of such real estate, the amount so accepted shall be withdrawn from such deposit fund account and deposited in the Treasury of the United States as internal revenue collections. Upon the rejection of any such offer, the Secretary or his delegate shall refund to the maker of such offer the amount thereof.

(26 U.S.C. 1958 ed., Sec. 7809).

Treasury Regulations on Procedure and Administration (1954 Code):

Sec. 301.7122-1. COMPROMISES.

* * * * *

(d) Procedure with respect of offers in compromise —

* * * * *

(4) Withdrawal or rejection. An offer in compromise may be withdrawn by the proponent at any

time prior to its acceptance. In the event an offer is rejected, the proponent shall be promptly notified in writing. Frivolous offers or offers submitted for the purpose of delaying the collection of tax liabilities shall be immediately rejected. If an offer in compromise is withdrawn or rejected, the amount tendered with the offer, including all installments paid, shall be refunded without interest, unless the taxpayer has stated or agreed that the amount tendered may be applied to the liability with respect to which the offer was submitted.

* * * * *

(26 C.F.R., Sec. 301.7122-1).

STATEMENT OF THE CASE

In 1951, the Banner Bed Company and its stockholders, the Liebermans, owed federal income taxes substantially in excess of $50,000.00. For certain reasons of his own, Morris J. Rubin, who owned and controlled plaintiff (which was the successor in interest of its subsidiary, Morgan Manufacturing Corporation), but who was not connected with Banner Bed Company or the Liebermans (the taxpayers involved in this litigation), decided to make available $50,000.00 for use in compromising these obligations of the others; he wished, though, to make sure that he would get this money back if the government rejected or took no action on the compromise. (A. 1-2).

To protect this interest, plaintiff's wholly owned subsidiary (Morgan Manufacturing Corporation) handed over the money to a firm of lawyers (Schwartz & Freeman), as Escrow Agents, under an agreement that the money was to be used to settle the tax liabilities, as aforesaid, but on condition that any offer to the Internal Revenue

Service was to expire on March 15, 1952, and also, that if the offer was not accepted by that date, or if it was earlier rejected, the money was to be returned to the Escrow Agents for delivery to Morgan. An Offer in Compromise in the amount of $50,000.00 was then made by Banner and the Liebermans, stating that the money had been "borrowed" and was to be returned to Schwartz & Freeman if the Offer was rejected or if no final action was taken by March 15, 1952. (Pl. Ex. 1; Tr. 21; A. 2). On the same day, the Escrowees sent a letter to the Service, (Pl. Ex. 2; Tr. 21; A. 2), enclosing a certified check of their own bearing a restrictive endorsement and asking that it be returned in the same circumstances. (A. 2). The endorsement read as follows: "Tendered in connection with Offer in Compromise of Banner Bed Co., *et al.* Subject to the terms and conditions of letter of Schwartz & Freeman dated August 7, 1951." (Plaintiff's Exhibit No. 16; Tr. 38, 39).

On July 22, 1953, Mr. Leo Schwartz (Escrow Agent) addressed a second letter to the Director of Internal Revenue at Chicago, Illinois, wherein paragraph (b) of his original transmittal letter was changed to read: "(b) In the event the Offer is rejected, the $50,000.00 shall be promptly returned to the undersigned", thereby eliminating the previous deadline of March 15, 1952. (Plaintiff's Exhibit No. 3; Tr. 22, 59).

Prior to this, on April 14, 1952, the Collector of Internal Revenue at Chicago, Illinois, addressed a letter to Mr. Schwartz informing him that action on the Offers submitted by the taxpayers were stil pending and that he would be advised by the Bureau in due course. (Plaintiff's Exhibit No. 20; Tr. 51, 52).

In 1957, the Service informed only the taxpayers that, to remedy technical objections, separate compromise offers would have to be made for each, in place of the lump sum previously tendered on behalf of all. As a result, later in the same year, separate offers totaling $50,000.00 were made for the individual taxpayers; Banner Bed Company (which, by then, was practically dead) was entirely eliminated. The funds which came from the plaintiff remained on deposit for use in connection with the revised compromise offers. (A. 3). To accomplish this purpose, a check was issued by the Treasury Department payable to all of the taxpayers, including Banner Bed Company, and was endorsed and returned to the Treasury Department. (A. 22, 23). This was done without informing Schwartz & Freeman, the Escrow Agents, (Tr. 64, 65).

By the close of 1958, the Internal Revenue Service had not yet acted on the revised offers, but the plaintiff again, for reasons of its own, was no longer willing to continue with the arrangement. Accordingly, in January of 1959, the plaintiff, again acting through its Escrow Agents, demanded the return of the funds. Upon refusal of its demand by the Service, plaintiff instituted the suit in the Court below. (A. 3).

In 1962, while the suit was pending, the Commissioner of Internal Revenue accepted the individual revised Offers in Compromise, subject to the lower Court's determination that defendant was entitled to retain the funds (A. 3).

It is to be noted, that the Liebermans have intervened as third party defendants and Schwartz & Freeman, the Escrow Agents, have intervened as plaintiffs. Banner Bed Company, the corporate taxpayer for which the Compromise Offer was originally made, but which was later eliminated, is not a party to the action. (Footnote, A. 3).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE UNITED STATES COURT OF CLAIMS LENDS APPROBATION TO THE OPPRESSIVE PRACTICE OF THE UNITED STATES TREASURY DEPARTMENT IN PROCRASTINATING IN ITS CONSIDERATION OF OFFERS IN COMPROMISE.

The facts of this case make clear the oppressive nature of some of the governmental acts involved. Congress has invested the Secretary of the United States Treasury Department with the power to compromise a civil tax liability (Internal Revenue Code (1954), Section 7122). The Treasury Department provided, in Section 301.7122 (d)(4) of Regulations, that sums deposited with the Treasury in connection with such Offers in Compromise bear no interest. The monies are often on deposit for many years awaiting Treasury action. In the instant case, for example, the sum was deposited in August, 1951; the Treasury did not act upon the offer until eleven (11) years later in July, 1962. It is a fair assumption that had not the plaintiff, previous to said acceptance, demanded a return of the money and filed suit to recover same, that the Offer in Compromise involved might still not be accepted. It is respectfully submitted that an eleven-year consideration of the offer involved in this matter is indeed oppressive.

In answer to a claim for interest in an earlier case, the Court of Claims previously explained why there was no injustice in the Government's not paying interest by stat-

ing that the person who deposited the money was free at any time to obtain the return of the deposit. *Moskovitz* v. *U. S.*, 285 F. 2d, 451 (1961).

In the circumstances of the present case, however, the Court of Claims ruled that no one was in a position to obtain a return of the deposit. The taxpayer could not obtain its return, because the Treasury held it under the express stipulation that it was to be returned to the petitioner herein if the Offer was rejected. The petitioner, so the Court of Claims held, could not obtain its return because it did not sign the Offer in Compromise and was, therefore, not a "proponent" within the meaning of the Treasury Regulation. On this purely formalistic ground the Court of Claims has established a basis for oppressive governmental action.

It is our contention, of course, that the petitioner herein, having deposited the sum with the Treasury of the United States, was the "proponent" and was entitled to withdraw the deposit. The question which this Court is now called upon to settle is whether it was the intent of Congress and of the Treasury Regulation, that once a sum is deposited, the government may hold it for the indefinite future until it, in its own good time, decides to act on the Offer. In this case, the United States Court of Claims, by its decision, has created an oppressive and untenable unilateral arrangement.

II.

THE UNITED STATES COURT OF CLAIMS HAS CONSTRICTED AND TOO NARROWLY INTERPRETED THE MEANING OF THE TERMS "MAKER OF SUCH OFFER", AS CONTAINED IN SECTION 7809 OF THE 1954 INTERNAL REVENUE CODE, AND "PROPONENT", AS SET FORTH IN THE TREASURY REGULATION RELATING TO COMPROMISES.

The United States Court of Claims has decided an important question relating to the construction and application of Section 7809 of the 1954 Internal Revenue Code and of Treasury Regulation 301.7122-1, which has to do with an important aspect of the compromise of tax claims. The question has not been, but should be, settled by this Court. The particular provision of the Regulation reads as follows:

> "Treasury Regulations on Procedure and Administration, 1954 Code: Section 301.7122-1.
> COMPROMISES
>
> * * * * *
>
> (4) Withdrawal or rejection.
>
> An Offer in Compromise may be withdrawn by the *proponent* at any time prior to its acceptance." (Emphasis added)

In the instant case, the lower Court ruled that the taxpayers, because they signed the Offer in Compromise, are the exclusive "proponents". This, despite the fact that it finds that the term "proponent" may cover a class of individuals other than the taxpayer, stating on page 8 of its Opinion (App. 11)—"The Regulation seems deliberately to use 'proponent' instead of 'taxpayer'; the of-

ficial form for an Offer in Compromise (Form 656—Pl. Ex. 1) also seems to use "proponent" as distinct from "taxpayer"; and the form for Statement of Financial Condition and Other Information (to be filed with an offer in compromise) (Form 433—App. B-P. 33), at least in its current version, expressly requests, "If proponent is not taxpayer" the proponent's name, address, and "relationship to taxpayer (partner, president, father, etc.)". The Court continued, "But we think, in any event, that the "proponent" must be a person who submitted the offer in compromise (perhaps together with the taxpayer), not simply one who advanced or supplied the funds accompanying the offer."

From this it must be concluded that the only party entitled to withdraw an Offer in Compromise would be the party signing same. While it is true that in the instant case, only the taxpayers signed the offer in compromise, the lower Court has seen fit to ignore the rights of the plaintiff herein, despite the fact that the Offer in Compromise submitted by the taxpayers, referred to and incorporated the terms of a transmittal letter, accompanying the Offer and submitted by Schwartz & Freeman, escrow agents.

The Court, on page 11 of its Opinion (App. 14), states, "The submission, even as expanded to include the escrow agents—contemporaneous letter forwarding the check, said only that the money was to be returned to Schwartz & Freeman if no final action was taken by March 15, 1952 (a limitation which was later removed), or, if the Offer was rejected." It then rationalized (App. 14), by saying, "Nothing was said about the right of Schwartz & Freeman (or the plaintiff) to withdraw the money or the offer, nor was there any suggestion that either or both were offered

or joined as offerors; on the contrary, the escrowees' letters specifically referred to the Banner Bed Company and the Liebermans as making the Offer." Thus, the Court locked them out.

The questions which arise from this rationalization are: What if the time limitation had not been removed? Or, what would have been the rights of the plaintiff had the original offer been rejected (and it was virtually rejected when the Treasury Department advised the taxpayers that if they did not withdraw their Offers they would be rejected)? (Pl. Exhibit 4; Tr. 22, 113). To carry the logic of the lower Court's decision to its ultimate conclusion, would the plaintiff then have had rights under the Offer in Compromise? It appears not, since they were ruled out as "proponents".

A check for $50,000.00 submitted by Schwartz & Freeman bore the following endorsement, "Tendered in connection with Offer in Compromise of Banner Bed Co., *et al.*, subject to the terms and conditions of letter of Schwartz & Freeman dated August 7, 1951." (Pl. Ex. 16; Tr. 38, 39). Did the acceptance of this check, with the aforesaid endorsement, by the then Collector of Internal Revenue at Chicago, Illinois, and the depositing of same create no rights in the plaintiff or its escrow agents? The lower Court has seen fit to ignore this endorsement.

If the plaintiff or its Escrow Agents were not "proponents", why did the Collector recognize Schwartz & Freeman by advising them of the status of the offer in compromise in his letter to them on April 14, 1952? (Pl. Ex. 20; Tr. 51, 52). If the plaintiff or its escrow agents were not "proponents", why did the personnel of the Bureau of Internal Revenue testify that the consent of Schwartz & Freeman was needed for the reapplication of the funds to new Offers that were submitted? (Tr. 115).

In the light of this evidence the lower court has ruled that there were no rights vested in the plaintiff or its escrow agents. It has held that the only person having rights under an offer in compromise as a "proponent" are those who actually sign the offer. The entire terms of the offer are to be found only within the four corners of the offer itself; that there can be no rights outside of the offer, despite the fact that as in this case, there was reference to a transmittal letter in the offer itself; there was an endorsement on the check relating to the offer; there was correspondence recognizing parties outside of the offer; and, finally, there was recognition of the taxpayer and the escrow agents by the personnel of the Bureau of Internal Revenue.

The question naturally arises if the plaintiff or its agents were not proponents and were not offerors, what were they? It is respectfully submitted that the conclusion drawn from the foregoing facts by the United States Court of Claims too narrowly construes the meaning of the term "maker of such offer" as contained in Section 7809 of the 1954 Internal Revenue Code and the meaning of the term "proponent" as used in Treasury Regulation 301.7122-1.

To support this construction, it reasons that a contrary holding would impose a burden upon the Treasury Department to determine the rights of others. We respectfully submit that in the instant case there would have been no burden whatsoever imposed upon the Bureau of Internal Revenue, because the position of the plaintiff was crystal clear in the submission of the moneys accompanying the offer in compromise.

At all times it knew that if it did not accept the offer it was required to return the money to the petitioner and no one contends otherwise. It is a reasonable inference

that, having procrastinated for approximately eleven (11) years, and causing the petitioner to withdraw its Offer, the Treasury would refuse to honor the petitioner's demand because it well knew that the taxpayers had no money to pay the taxes. If the government did not take the petitioner's money it knew that the taxes could not be collected. The lower court's statement on page 13 of its Opinion (App. 17), "Plaintiff, which obviously feels that it has paid out $50,000.00 to benefit others, without any advantage to itself, may have a cause of action against the taxpayers (or some one else) for unjust enrichment, breach of contract or breach of trust," is pure sophistry.

The decision contravenes a ruling of the Comptroller General of the United States (A. 26679), promulgated July 23, 1929. In that ruling the Comptroller General stated, "It is well settled that if an offer in compromise be rejected it must be refunded. It is equally clear that the party who in fact made the offer is the one entitled to the refund thereof." He ruled, that while in that case, the offer was submitted by an individual, it was in fact made on behalf of a corporation which tendered the funds, and the ruling continues to reason that the refund be made to the party who, in fact, made the tender of the money, and not necessarily the taxpayer.

The same rationale is embodied in *Heffernan* v. *Alexander*, 48 F.2d, 855 (1931). This was a District Court case decided in the Western District of Oklahoma and stated the oft-repeated rule that "If the compromise were not accepted, then the parties should be placed in exactly the same position in which they were at the time the compromise was offered." This is contractual law of long standing.

III.

THE RULING OF THE UNITED STATES COURT OF CLAIMS, RESTRICTING THE USE OF THE WORD "REJECTION" IN SECTION 7809 OF THE INTERNAL REVENUE CODE AND REGULATION 301.7122-1 IS NEITHER FAIR NOR EQUITABLE UNDER THE FACTS OF THIS CASE.

Section 7809 of the 1954 Internal Revenue Code provides, "Upon the rejection of any such offer, the Secretary or his delegate shall refund to the maker of such offer the amount thereof." Treasury Regulation 301.7122-1 provides, "(4) Withdrawal or rejection. An offer in compromise may be withdrawn by the proponent at any time prior to its acceptance. In the event an offer is rejected, the proponent shall be promptly notified in writing . . . " The lower court in its decision (App. 15), states that Section 7809, "deals only with the rejection of an offer, not with withdrawal prior to action by the Service." And continues, "There was in this case no rejection by the Service; the offers, as revised, were accepted, belatedly, in 1962." This reasoning contravenes equitable consideration.

The plaintiff respectfully urges that in this case, the taxpayers were advised that if they did not withdraw their offers as originally submitted, that same would be rejected. (Pl. Ex. 6; Tr. 23). They accordingly withdrew their offers, as originally submitted, and submitted new offers. The Treasury issued its check for $50,000 to them and they endorsed it back to the Bureau of Internal Revenue. All without any notice of same being given plaintiff or its escrow agents (Tr. 64, 65, 86.) It is respectfully submitted that this too was an oppressive action, abrogating the rights under which the monies were tendered.

For the lower court to reason that there is a considered difference between a "rejection" and a request, "that

unless the offer is withdrawn it will be rejected," is to draw an exceedingly fine line of differentiation. The Regulation treats the subject matter as "withdrawal or rejection".

What is, doubtless, the intendment of Congress and the Treasury Department is the disintegration of the contractual relationship and the return of the funds submitted. Whether the offer is withdrawn or whether it is rejected is not of paramount significance. What is important is whether contractual obligations are terminated and the parties are to be restored to their original position. It is of vital importance that a clarification of the intendment of Congress and the Treasury Department be enunciated by this Court.

CONCLUSION.

It is respectfully submitted that there is here involved a serious question of interpreting the Rules and Regulations relating to offers in compromise. It is urged that the United States Court of Claims in its decision has applied a very narrow and strict interpretation to the intent of Congress in the enactment of Section 7809 of the 1954 Internal Revenue Code and Treasury Department Regulations, Section 301.7122-1(d)(4). It is important that the meaning of "maker of the offer" and the use of the word "proponent" be clarified, as well as the meaning of "rejection". Finally, it is of vital importance that Offers in Compromise be processed expeditiously and without undue delay on the part of the Bureau of Internal Revenue. Particularly, in view of the fact that the funds advanced lie sterile during the long periods of consideration.

Respectfully submitted,

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